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No. 00-____

IN THE

Supreme Court of the United States

ERICA DORWART,
Petitioner,

v.

JAMES D. SICKING AND GLORIA J. SICKING,
Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 5, Title 10 of the Oklahoma Statutes allows a district court to order visitation for a child's grandparents over the parent's objection "if the district court deems it to be in the best interests of the child." 10 Okla. Stat. § 5 (Supp. 1999). Applying that statute in this child custody case, the Oklahoma District Court granted the parents of petitioner's ex-husband the right to visit petitioner's child once every two weeks. The Oklahoma Court of Civil Appeals affirmed the order, rejecting petitioner's federal constitutional challenge. The Oklahoma Supreme Court denied a petition for certiorari over the dissent of four Justices, who would have stayed the petition to await a decision by this Court in *Troxel v. Granville*, No. 99-138.

The following question is now presented:

Whether the Court should grant review, vacate the judgment below, and remand the case to the Oklahoma Court of Civil Appeals for reconsideration, in light of this Court's decision in *Troxel v. Granville*, 120 S. Ct. 2054 (2000), of the question whether the Oklahoma grandparents' visitation statute, 10 Okla. Stat. § 5, either on its face or as applied in this case to grant third parties an independent visitation right over petitioner's objection, deprives petitioner of her right under the Due Process Clause of the Fourteenth Amendment to direct and control the upbringing of her daughter.

PARTIES

The petitioner in this case is Erica Dorwart, plaintiff in the state court proceedings. Petitioner is the natural mother of daughter C.M.

Respondents are James D. and Gloria J. Sicking, intervenor-defendants below and the parents of James D. Sicking, Jr, defendant below and petitioner's ex-husband and the father of C.M.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Erica Dorwart respectfully requests that a writ of certiorari issue to review the judgment of the Oklahoma Court of Civil Appeals in *Sicking v. Sicking*, No. 91490. Petitioner further requests that the judgment be vacated and remanded for reconsideration in light of this Court's opinion in *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals is reported at 996 P.2d 471, and is reprinted in the appendix to this petition at App. 1a. The district court's visitation order

is unreported and is reprinted in the appendix hereto at App. 14a.

JURISDICTION

The opinion of the Oklahoma Court of Civil Appeals was issued August 27, 1999. A timely petition for rehearing was denied October 14, 1999, App. 25a, and a timely petition for certiorari was denied by the Oklahoma Supreme Court on February 16, 2000, App. 23a. An application for an extension of time in which to file this petition was granted by Justice Breyer on May 4, 2000, extending the time in which to file this petition to July 15, 2000 – a Saturday, making the petition due Monday, July 17, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Title 10, § 5 of the Oklahoma Statutes provides in pertinent part:

> A.1. Pursuant to the provisions of this section, each and every grandparent of an unmarried minor child shall have reasonable rights of visitation to the child if the district court deems it to be in the best interest of the child. The right of visitation to any grandparent of an unmarried minor child shall be granted only so far as that right is authorized and provided by order of the district court.
>
> * * * *
>
> B. In determining the best interest of the child, the court shall consider:

> 1. The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents;
>
> 2. The length and quality of the prior relationship between the child and the grandparent or grandparents;
>
> 3. The preference of the child if the child is determined to be of sufficient maturity to express a preference;
>
> 4. The mental and physical health of the child;
>
> 5. The mental and physical health of the grandparent or grandparents; and
>
> 6. Such other factors as are necessary in the particular circumstance.

10 Okla. Stat. § 5 (Supp. 1999).

STATEMENT OF THE CASE

This petition arises out of judicial proceedings involving the custody of petitioner's daughter C.M., which resulted in the entry of an order granting C.M.'s grandparents the right to visit C.M. once every two weeks. Petitioner submits that the order and the appellate court's affirmance of the order are inconsistent with the subsequent decision of this Court in *Troxel v. Granville*, 120 S. Ct. 2054 (2000). Petitioner therefore seeks a writ of certiorari granting review of the decision of the Oklahoma Court of Civil Appeals, vacating that decision and remanding the case for reconsideration in light of *Troxel*.[1] *See Lawrence v. Chater*, 516 U.S. 163, 166-67

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[1] Because this petition "draw[s] into question" the constitutionality of 10 Okla. Stat. § 5 and neither the state of Oklahoma nor any agency, officer, or employee thereof is a party to this proceeding, petitioner notes that 28 U.S.C. § 2403(b) may apply and

(1996) (per curiam) (approving of "GVR" order where intervening developments, including postjudgment decision by this Court, cast doubt on the judgment rendered by a state court on federal question); *id.* at 180 (Scalia, J., dissenting) (same).

1. Petitioner married James D. Sicking, Jr., on April 30, 1996. Petitioner filed for divorce approximately three months later because of Sicking's drinking and verbal abuse, and an agreed divorce was entered on November 8, 1996. Petitioner was pregnant at the time of the divorce, and the divorce decree reserved paternity and custody issues for future resolution. Petitioner gave birth to C.M., a girl, on February 19, 1997. In August 1997, during the pendency of the post-divorce proceedings over custody of C.M. between petitioner and Sicking, respondents James D. and Gloria Sicking, the parents of Sicking and grandparents of C.M. ("grandparents" or, as appropriate, "grandfather" and "grandmother"), filed a petition to intervene in the custody proceedings seeking independent visitation of C.M. under 10 Okla. Stat. § 5. At the time of petitioner's marriage to Sicking, he was estranged from his parents, and they had never developed any relationship with C.M. It has never been disputed that petitioner is a fit parent. At trial (and in subsequent appellate proceedings) Sicking disclaimed any interest in the dispute between petitioner and the grandparents over the grandparents' visitation rights. Trial was held on portions of five days from November 18, 1997 to January 7, 1998.

The district court pronounced oral judgment on January 26, 1998. The court gave petitioner primary custody of C.M., and (after modification of the order) allowed Sicking visitation for two hours on Tuesday and Thursday of each week and an additional two hours every other Saturday. Ap-

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that a copy of this petition has been served on the Attorney General of Oklahoma. S. Ct. R. 29.4(c).

plying the terms of 10 Okla. Stat. § 5, the district court further concluded that visitation for the grandparents would be "in the best interests of the child." App. 19a. The court therefore awarded the grandparents visitation once every two weeks in conjunction with Sicking's visitation, and independent visitation if Sicking was "unable" to exercise his visitation right. App. 20a. The court, however, also prohibited the grandmother from driving C.M. in any vehicle, and prohibited the grandmother from being alone with C.M. at any time. *Id.*

2. Petitioner moved for reconsideration of the order granting the grandparents visitation. After the submission of that motion, the Oklahoma Supreme Court issued a decision holding 10 Okla. Stat. § 5 unconstitutional in some applications. *See In re Herbst*, 971 P.2d 395 (Okla. 1998). Petitioner filed a timely supplement to her motion for reconsideration addressing *Herbst* and raising for the first time a federal constitutional challenge to the visitation statute and order applying it. The motion for reconsideration was denied, but the order was stayed pending appellate proceedings.

3. Petitioner appealed from the order granting visitation to the grandparents. She did not (and does not) oppose all visitation, but opposed the aspects of the order granting the grandparents *independent* visitation rights. Petitioner argued, *inter alia*, that the visitation order under 10 Okla. Stat. § 5 violated her rights under the Fourteenth Amendment to the Constitution. *See* Appellant's Brief in Chief 19-22; Appellant's Reply to Intervenors' Answering Brief 13-18. The grandparents argued that the issue had not been preserved, but the Court of Civil Appeals explicitly held that "the record supports the conclusion that the issue was preserved for appellate review." App. 5a n.2.

Addressing petitioner's constitutional challenge issue on its merits, the court concluded that § 5 is *not*

> unconstitutionally applied when the parents of a non-custodial parent involved in a divorce case are given "independent" rights to visit with their grandchild, with the support and the approval of the non-custodial parent, during the time which would otherwise be used by the non-custodial parent for visitation with the child and the non-custodial parent is unable to exercise that visitation.

App. 6a. The court held that the grandparents' visitation order did not violate petitioner's right to control the upbringing of her child in part because "the termination of the relationship between the child's parents" – i.e., the divorce – made "state interference with parental rights to custody and control of children . . . permissible." *Id.* According to the court, petitioner had failed to provide "any authority which would give her the unilateral veto she seeks over the relationships which [C.M.] will be allowed to enjoy." *Id.* Furthermore, as to the statutory "best interest" determination, the court refused to accord any deference to petitioner's wishes regarding grandparent's visitation, holding that "custody and visitation are matters of equity, and they are left to the sound discretion of the trial court." App. 8a.

REASONS FOR GRANTING THE WRIT

1. In *Troxel v. Granville*, 120 S. Ct. 2054 (2000), this Court by a 6-3 vote affirmed the judgment of the Washington Supreme Court holding that an order applying a state third-party visitation law and granting a child's grandparents more visitation than the child's parent desired violated the parent's constitutional right to control and direct the upbringing of her children. While differences among individual Justices' reasoning left the Court without a majority opinion, the Court – including Justices who dissented from the ultimate disposition – was nearly unanimous in the view that the Constitution recognizes and protects "the fundamental right of

parents to make decisions concerning the care, custody, and control of their children." 120 S. Ct. at 2059 (opinion of O'Connor, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.); *see id.* at 2076 (Kennedy, J., dissenting) ("[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.").[2]

Building from that foundation, Justice O'Connor's opinion for the plurality held that the visitation order was unconstitutional because neither the statute nor the order applying it recognized the "presumption that fit parents act in the best interest of their children." *Id.* at 2061 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). The Constitution requires, in other words, that a court making a visitation determination "accord at least some special weight to the parent's own determination" as to whether visitation is in the child's best interests. *Id.* at 2062; *see id.* at 2061 ("Section 26.10.160(3) contains no requirement that a court accord the parent's [visitation] decision any presumption of validity or any weight whatsoever."); *id.* at 2062 ("The problem here is not that the Washington Superior Court intervened, but that

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[2] *See also id.* at 2066 (Souter, J., concurring in judgment) ("We have long recognized that a parent's interests in the nature, upbringing, companionship, care, and custody of children are protected by the Due Process Clause of the Fourteenth Amendment."); *id.* at 2068 (Thomas, J., concurring in judgment) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *id.* at 2071 (Stevens, J., dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest – absent exceptional circumstances – in doing so without the undue interference of strangers to them and to their child.").

when it did so, it gave no special weight at all to Granville's determination of her daughter's best interests.").

A majority of Justices clearly agreed with that basic constitutional analysis. Justice Souter concurred, objecting not to the order but the statute itself, concluding that because the statute on its face failed to accord any presumption in favor of a fit parent, the order applying it was necessarily unconstitutional. *Id.* at 2066-67 (Souter, J., concurring in judgment). Justice Thomas concurred on similar grounds, concluding that the statute itself was unconstitutional because that the state "lack[ed] even a legitimate governmental interest – to say nothing of a compelling one – in second-guessing a fit parent's decision regarding visitation with third parties." *Id.* at 2068 (Thomas, J., concurring in judgment). Justice Stevens, while disagreeing with Justice Souter that the statute itself was facially invalid and disagreeing with the plurality that an as-applied challenge had been made, agreed with both that the Court's "substantive due process case law includes a strong presumption that a parent will act in the best interests of her child." *Id.* at 2073 (Stevens, J., dissenting). Justice Stevens therefore concluded that if an as-applied challenge were brought "it would be necessary . . . to consider whether the trial court's assessment of 'the best interest of the child' incorporated the presumption." *Id. See also id.* at 2079 (Kennedy, J., dissenting) (acknowledging that "best interests of the child" test as applied in certain cases may "give insufficient protection to the parent's constitutional right to raise the child without undue interference by the state").

Thus, the seemingly diverse opinions in *Troxel* reduce to a single, clear constitutional lesson: a state third-party visitation statute cannot constitutionally be applied to order visitation over a fit parent's objection unless either the statute or

the court applying it accords a strong presumption in favor of the parent's decision regarding visitation.

2. The decision below cannot be reconciled with either the judgment in *Troxel* or the reasoning, just discussed, common to opinions signed by a majority of the Justices. The petitioner in this case, just like the parent in *Troxel*, is conceded by all to be a fit parent. The statute in this case, just like the statute in *Troxel*, "places the best-interest determination solely in the hands of a judge." *Id.* at 2061 (opinion of O'Connor, J.). And the order in this case, just like the order in *Troxel*, "gave no special weight at all to [petitioner's] determination of her daughter's best interests." *Id.* at 2062.[3]

The court of appeals below rejected petitioner's constitutional challenge to the grandparents' request for an independent right of visitation under that statute on the ground that the custody proceeding below arose out of a divorce proceeding. App. 6a. More important, in determining whether an independent right of grandparent visitation was in C.M.'s best interests, both courts below failed to accord any deference at all to petitioner's views as to whether such a right was in her child's best interests.

Nothing in the district court's opinion and order even hints that the court gave the required "special weight" to petitioner's determination of her own daughter's best interests. To the contrary, the district court read 10 Okla. Stat. § 5 as *requiring* the court afford the grandparents visitation – de-

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[3] It also bears noting that the petitioner in this case, just like the parent in *Troxel*, does not object to *all* visitation by her child's grandparents (it is only the *independent* right of visitation – i.e., a right separate and apart from that of C.M.'s father – to which she objects) and that the grandparents in this case, *unlike* the grandparents in *Troxel*, had no preexisting relationship at all with petitioner's daughter.

spite petitioner's objection – if the *court* found it to be "in the child's best interests." App. 19a. The court of appeals then treated the question whether visitation should be allowed as an even-up dispute on the evidence between petitioner and the trial court, and in fact held that petitioner bore the heavy burden of "affirmatively show[ing]" on appeal that the trial court's view of the child's best interests was against "the clear weight of the evidence":

> [C]ustody and visitation are matters of equity, and they are left to the sound discretion of the trial court[,] *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355, and "[t]he trial court is entitled to choose which testimony to believe as the judge has the advantage over this Court in observing the behavior and demeanor of witnesses." *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112. The trial court's ruling will not be disturbed on appeal unless it is against the clear weight of the evidence, *Kahre*, and the one who alleges error in the trial court's determination on visitation puts forth the evidence relied upon and affirmatively shows how the determination is contrary to the best interest of the child.
>
> Clearly, Mother disagrees with the trial court's assessments of some of the evidence. In addition to the testimony of the parties, the trial court heard testimony and received reports from several expert witnesses concerning visitation. This record contains evidentiary materials and testimony which, if given credence, support the trial court's determination that [C.M.'s] best interest is served by allowing Grandparents visitation. The record also shows that the trial court applied the factors listed in § 5(B) when determining if [C.M.'s] best interest was served by allowing visitation. Mother has not affirmatively

> shown that the determination of the trial court are against the clear weight of the evidence.

App. 8a-9a.[4]

The Washington statute at issue in *Troxel* raised a constitutional problem because under its terms, "[s]hould the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails." 120 S. Ct. at 2061 (opinion of O'Connor, J.) For Justice Souter the mere fact that the statute conferred essentially unbounded discretion on the judge to simply disagree with the mother was sufficient to invalidate the statute. *See supra* at 8. For the plurality, the *order* was unconstitutional because it "was based on precisely the type of mere disagreement we have just described and nothing more." 120 S. Ct. at 2061.

So it is here. Under the Oklahoma statute as applied here, "the judge's view [of a child's best interests] necessarily prevails." *Id.* And in the Oklahoma appellate court's own words, petitioner's objection to grandparents' visitation failed because she just "disagree[d] with the trial court's assessments of some of the evidence." App. 8a. But *Troxel* makes clear that if the record reflects "mere disagreement . . . and nothing more" between petitioner and the trial court, *Troxel*, 120 S. Ct. at 2061, petitioner's view as to whether grandparent visitation was in her daughter's best interests should have prevailed. Petitioner's own constitutional right to direct and control her daughter's upbringing required the Oklahoma courts to give strong weight to her view on that important matter before ordering independent third-party

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[4] The existence of factors in § 5 for the court to consider in making the best interest determination does not materially distinguish this case from *Troxel*. Most important, the statute does *not* include the parent's own views as among the factors the court must be consider, much less give special weight.

visitation over her objection. That they did not do so – indeed, that they gave it no weight at all – cannot be disputed.

Because neither the statute nor the court's order in this case "include[d] a strong presumption that a parent will act in the best interests of her child," *Troxel*, 120 S. Ct. at 2073 (Stevens, J., dissenting), and because proper application of that presumption may "determine the ultimate outcome of the litigation" in the state courts, *Lawrence*, 516 U.S. at 167, a GVR order is appropriate.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below vacated, and the case remanded to the Oklahoma Court of Civil Appeals for reconsideration in light of *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

Respectfully submitted,

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APPENDIX

APPENDIX A

Court of Civil Appeals of Oklahoma,

Division No. 1.

Erica SICKING, Plaintiff/Appellee/Counter-Appellant,

v.

James D. SICKING, Jr., Defendant/Appellee/Counter-Appellee, and James D. Sicking and Gloria J. Sicking, Intervenors/Appellants/Counter-Appellees.

No. 91490.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 1.

Aug. 27, 1999.

Appeal from the District Court of Tulsa County, Oklahoma; Honorable Clancy Smith, Judge.

AFFIRMED.

Jack R. Givens and Blake R. Givens, Jones, Givens, Gotcher & Bogan, P.C., Tulsa, Oklahoma, and Sam P. Daniel and Ron W. Little, Doener, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, For Plaintiff/Appellee/Counter-Appellant.

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OPINION

ADAMS, Judge:

¶ 1 Erica Sicking, now Erica Dorwart, (Mother) and James D. Sicking, Jr., (Father) married on April 30, 1996. Mother filed for divorce approximately three months later, and an agreed divorce was entered in November of 1996. At the time of the divorce, Mother was pregnant. The divorce decree reserved the issue of paternity and other child-related issues for future resolution. Animosity between Mother and Father continued after their daughter, C, was born the following February, and visitation became a point of contention. Father's parents, James D. Sicking and Gloria J. Sicking (Grandparents, or, as appropriate, Grandmother or Grandfather) also filed a petition to intervene in the divorce and asked for visitation with their granddaughter.

¶ 2 Following hearings held on five days over a three month period, the trial court entered a series of orders placing primary custody of C with Mother, ordering Father to pay child support, and giving Father visitation for two hours on Tuesday and Thursday of each week and an additional two hours on alternating Saturdays. The trial court also ordered that Grandparents would be allowed to visit C once every two weeks in conjunction with Father's visitation or without Father if Father was unable to exercise his visitation time. However, the trial court also ordered that C could not be a passenger in a vehicle being driven by Grandmother, and that Grandmother could visit with C only in the presence of Father or Grandfather.

¶ 3 Mother, Father, and Grandparents filed separate applications for attorney fees and costs. After hearing, the trial court ordered Father to pay a portion of Mother's attorney fees, ordered Mother to pay a portion of Father's attorney fees, and denied Grandparents' request to have Mother pay all or part of their attorney fees, concluding such an award was not authorized.

¶ 4 Grandparents appealed the order denying their re-

quest for attorney fees. Mother filed a counter-appeal seeking reversal of the order allowing Grandparents to have visitation with C and the order requiring her to pay a portion of Father's attorney fees.

GRANDPARENTS' APPEAL

¶ 5 As noted in *Walden v. Hughes*, 1990 OK 105, ¶ 2-3, 799 P.2d 619, "Oklahoma follows the general rule that attorney fees are generally not recoverable unless so provided by statute or enforceable contract ... This court, creating an exception to the general rule, has held that a court has the equitable power to award attorney fees in cases where 'an opponent has acted in bad faith, vexatiously, wantonly or for oppressive reason.' " (Citations omitted.) This equitable exception was first recognized in *City National Bank & Trust Company v. Owens*, 1977 OK 86, 565 P.2d 4.[1]

¶ 6 Grandparents first argue that the trial court was authorized to award attorney fees by 43 O.S.Supp.1997 § 110(C). Mother contends § 110 does not authorize an attorney fee award to an intervenor in a divorce case. Our resolution of this dispute must be found in the language of the section. The governing principle in statutory construction is legislative intent. *City of Chandler v. State ex rel. Department of Human Services*, 1992 OK 137, 839 P.2d 1352. Words or phrases are to be understood in the context of all of the statute. *Matter of Estate of Little Bear*, 1995 OK 134, 909 P.2d 42. Statutory construction is not necessary if the legislative intent is clearly expressed, *Matter of Estate of Flowers*, 1993 OK 19, 848 P.2d 1146. If legislative intent is clearly expressed, the ordinary meaning of the statutory language will

---

[1] Although Grandparents contend on appeal that the trial court had the equitable power to award attorney fees, they do not cite Owens or any of its progeny and appear to rely on what they perceive as a trial court's ability to do so when sitting as a court of equity rather than on any "bad faith" or "vexatious" litigation tactics by Mother.

control, *Oklahoma Association for Equitable Taxation v. City of Oklahoma City*, 1995 OK 62, 901 P.2d 800, cert. denied, 516 U.S. 1029, 116 S.Ct. 674, 133 L.Ed.2d 523.

¶ 7 Such clarity exists here. Section 110(C) provides, in pertinent part, that the trial court "may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances." (Emphasis added.) Grandparents' interpretation of § 110(C) would require us to substitute the word "any" for "either" and the phrase "of any other party" for "of the other." It is apparent § 110(C) contemplates but two parties, the divorcing husband and wife, and does not provide for an award of attorney fees and costs under the circumstances at hand.

¶ 8 Citing only *Blackwell Livestock Auction, Inc. v. Community Bank of Shidler*, Oklahoma, 1993 OK CIV APP 161, 864 P.2d 1297, Grandparents argue that "[a] court has the authority to award attorney fees in an action in equity." Blackwell was an action to enforce an equitable lien, and attorney fees are allowed by statute to "the party for whom judgment is rendered" in actions to enforce "any lien." 42 O.S.1991 § 176. *Blackwell* does not stand for the proposition urged by Grandparents, i.e., that a court sitting in equity may always award attorney fees to a party. Such a holding would be in direct conflict with Walden, an equitable action, where the Court concluded the prevailing party could not be awarded attorney fees. Under the circumstances of this case, Grandparents were not entitled to attorney fees on any ground urged by them in this appeal.

MOTHER'S COUNTER-APPEAL

Grandparental Visitation

Constitutional Question

¶ 9 Relying on *In the Matter of Herbst*, 1998 OK 100, 971 P.2d 395, Mother contends 10 0.S.Supp.1996 § 5 may

not be constitutionally applied to afford Grandparents "independent" visitation because they did not show a harm, or threat of harm, to C if Grandparents do not have such "independent" visitation.[2] In addressing this argument it is critical to recognize the important differences between the facts of this case and *Herbst*.

¶ 10 This case does not involve an intact nuclear family where both parents object to visitation by the grandparent. It does not even involve a divorce where both parents object to visitation by the grandparent, and it does not involve a divorce where a grandparent is given visitation in addition to that given to the non-custodial parent, thus invading time that would otherwise be available for the child to be with the custodial parent. *Herbst* has already decided that in the first circumstance, § 5 cannot be constitutionally applied absent harm or the threat of harm. We need not, and do not, decide in this case whether § 5 may be constitutionally applied in the latter two circumstances.

¶ 11 The narrow issue presented here is whether § 5 is unconstitutionally applied when the parents of a non-custodial parent involved in a divorce case are given "independent" rights to visit with their grandchild, with the support and the approval of the non-custodial parent, during the time which would otherwise be used by the non-custodial parent for visitation with the child and the non-custodial parent is unable to exercise that visitation.[3] We conclude that it

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[2] Grandparents argue Mother waived any constitutional challenge to grandparental visitation. However, the record supports the conclusion that the issue was preserved for appellate review.

[3] Mother apparently does not now object to Grandparents visiting with C during Father's visitation times, so long as Father accompanies them and the other limitations imposed by the trial court are followed. Her argument focuses on Grandparents' ability to visit with C during Father's normally scheduled times when Father is unable to do so.

is not.

¶ 12 According to Mother, *Herbst*, 1998 OK 100, ¶ 18, 971 P.2d at 398, prohibits court-imposed grandparental visitation in this case because "[a]bsent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon." Mother's reliance dismisses language immediately preceding that quotation that requires a "showing of harm, or threat of harm, to bring the issue before the court or some instance of death or divorce which brings the child's domestic situation within the provence of the court." (Emphasis added.) Mother says this is appropriate because the emphasized language "implies only the legal context in which the questions of harm or threat to the child's well being arises." According to Mother, even where the parents of the child are divorced, some threatened harm is necessary before the court may require a parent to allow a grandparent to visit with the child. We disagree.

¶ 13 The language chosen by the Court makes it clear that its decision does not impact the application of § 5 in cases involving divorced or divorcing parents. Moreover, one of the principal decisions relied upon in Herbst explicitly recognized "the termination of the relationship between the child's parents" as being an instance where "state interference with parental rights to custody and control of children is permissible" because "the health or welfare of a child is threatened." *Brooks v. Parkerson*, 265 Ga. 189, 193, 454 S.E.2d 769, 772 (1995).

¶ 14 Father supported Grandparents' request for visitation, and it is "his" time which Grandparents will use to foster a relationship with their grandchild. Mother has not presented us with any authority which would give her the unilateral veto she seeks over the relationships which C will be allowed to enjoy. The right protected in Herbst is a right

enjoyed by both parents. If Father chooses to foster a relationship between his parents and C by allowing them to visit with C, either with or without Father, during times when Father would ordinarily visit with C exclusively and such visitation is in C's best interest, Mother has no constitutional right to prevent it.

Presumption

¶ 15 Before ruling on a dismissal motion made by Mother at the close of Grandparents' evidence, the trial court commented, "I have to believe that there's some sort of presumption that ... where grandparents have a relationship with the child, that it is their right to continue that relationship." Mother argues that the trial court thereby improperly placed on her the burden of proving that visitation was not in the child's best interest. According to Mother, this is contrary to the explicit provisions of § 5 which give grandparents a "right" to visitation only upon a showing that such visitation is in the child's best interest.

¶ 16 Even if we were to agree with Mother that no such "presumption" exists and that its use would improperly shift the burden of proof, which we do not decide, it is clear from the trial court's own words that no presumption was applied, because the trial court also explicitly found that the sine qua non for the establishment of the presumption, "where grandparents have a relationship with the child," did not exist.[4] Any error of the trial court in concluding that a presumption might exist under the statute if the grandparents had estab-

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[4] In the very next sentence following the "presumption statement" the trial court said, "In this particular case, these grandparents do not have a relationship with the child that needs to be continued, because they have not been allowed to establish one for whatever reason. So this Court does not find that to be determinative in this case." Later in the proceedings, the trial court noted, "I would divine that there is no independent right to the grandparents."

lished a relationship with the child was harmless and cannot be the basis of reversal. *Wat Henry Pontiac, Inc. v. Pitcock*, 1956 OK 230, 301 P.2d 203.

Best Interest

¶ 17 Without question, even where § 5 may be constitutionally applied, grandparental visitation is appropriate only where that visitation is in the child's best interest. Moreover, this section requires the trial court to specifically consider several factors in making that determination. However, custody and visitation are matters of equity, and they are left to the sound discretion of the trial court. *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355, and "[t]he trial court is entitled to choose which testimony to believe as the judge has the advantage over this Court in observing the behavior and demeanor of the witnesses." *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112. The trial court's ruling will not be disturbed upon appeal unless it is against the clear weight of the evidence, Kahre, and the one who alleges error in the trial court's determination on visitation puts forth the evidence relied upon and affirmatively shows how the determination is contrary to the best interest of the child. *See Gorham v. Gorham*, 1984 OK 90, 692 P.2d 1375.

¶ 18 Clearly, Mother disagrees with the trial court's assessments of some of the evidence. In addition to the testimony of the parties, the trial court heard testimony and received reports from several expert witnesses concerning visitation. This record contains evidentiary materials and testimony which, if given credence, support the trial court's determinations that C's best interest is served by allowing Grandparents visitation. The record also shows the trial court applied the factors listed in § 5(B) when determining if C's best interest was served by allowing visitation.[5] Mother

---

[5] According to 10 O.S.Supp.1996 § 5(B):

has not affirmatively shown that the determinations of the trial court regarding C's best interest are clearly against the weight of the evidence.

Procedural Error

¶ 19 Mother argues the trial court should have allowed her to personally read and review Grandmother's psychological reports and personal journal so she could assess Grandmother's physical and psychological fitness to exercise visitation, arguing that she was thereby denied "the right to fully participate in her defense of the [Grandparents'] attempt to gain full non- custodial rights to Mother's child." Mother's counsel was able to inspect the reports and journal, but she did not have physical access to them.[6] Mother's

---

In determining the best interest of the minor child, the court shall consider:

1. The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents;

2. The length and quality of the prior relationship between the child and the grandparent or grandparents;

3. The preference of the child if the child is determined to be of sufficient maturity to express a preference;

4. The mental and physical health of the child;

5. The mental and physical health of the grandparent or grandparents; and

6. Such other factors as are necessary in the particular circumstances.

[6] An agreed protective order regarding Grandmother's medical records, including items such as notes and files, and all interrogatories, depositions and the like quoting or summarizing those medical resources was entered on October 2, 1997. The order provided that the materials could be disclosed by counsel to their clients, but "[n]o copies of any such documents shall be disseminated to parties, or retained by them,

counsel was able to tell her about the materials' contents and had marked portions he found relevant to the litigation for use during trial. Mother was able to voice her opinions about Grandmother's fitness for visitation. Mother has not shown how she was prejudiced by failing to be able to personally read the materials rather than relying upon the assessments given by her own counsel and by experts questioned about the significance of their contents, and she may not obtain reversal without showing such prejudice.

Attorney Fees

¶ 20 Mother argues that the trial court erred in awarding Father attorney fees.[7] Mother argues the trial court improperly based its award of fees upon financial support Mother received from her parents and her speculative future employment. In making the decision on attorney fees, the trial court did note that Mother was "currently a student living with her parents, who are defraying all her expenses," that she was in her third year of law school, and that she ranked near the top of her class. The trial court also noted Father's

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other than to a party whom such medical records pertain; but counsel alone may retain a copy thereof in their files for purposes of appeal, retrial, future modification or for purposes provided in paragraph 7 hereof." Paragraph 7 limited use of information from the confidential or privileged documents under the order to preparation and trial, including appeals or retrial, and to diagnosis, treatment or care of C.

[7] We do not consider Mother's claims that the trial court improperly denied "virtually all of ... Mother's application for attorneys fees against [Father]" because the record does not show Mother requested any attorney fee award against Father other than her fees incurred during the period he was denying paternity, all of which the trial court awarded to her. Further, we do not consider Mother's contingent argument that she should have received attorney fees against Grandparents if we were to decide 10 O.S.Supp.1996 § 5 allows an attorney fee to the prevailing party. Mother took the position in the trial court that § 5 did not allow such fees, and on appeal, Grandparents have abandoned any argument for fees based on § 5.

gross monthly income. However, the trial court clearly based its decision on factors other than the ability to pay.

¶ 21 In its January 26, 1998 Order, the trial court found that, according to an expert's testimony, Mother "does not support visitation between [Father] and the minor child" and based upon "insufficient reason" terminated Father's visitation on September 17, 1997. The trial court found Mother had alleged Father had a "drinking problem," but the allegation was not supported by the evidence presented. Mother did not advise Father of the child's birth and "caused the hospital not to report the birth" in the newspaper.

¶ 22 The trial court's ruling on attorney fees finds that Mother retained an expert to make a visitation recommendation and Father agreed to abide by that recommendation. The expert made the recommendation on June 26, 1997, but Mother refused to accept it. The trial court found that Father had incurred $14,833.75 in attorney fees since the rendition of the recommendation and that his agreement to follow the recommendation was reasonable. The trial court also determined that Mother's "posture regarding [Father's] visitation was unreasonable" and that she had acted arbitrarily and capriciously, "and exacerbated the litigation" by refusing to allow Father visitation in excess of thirty minute periods, refusing to allow him to bring Grandparents for a visit, and in terminating Father's visitation in September of 1997. The trial court noted "the level of acrimony in this case from [Mother] to [Father] is unprecedented for a marriage that only lasted two months."

¶ 23 The trial court then ordered Mother to pay Father $9,790.27, which was identified as two-thirds of the amount he incurred after June 26, 1997. That amount was net of reductions of $1,221 and $1,175, the amounts, respectively, which Mother requested in a fee application and which Father had expended earlier in the litigation when he ques-

tioned paternity.

¶ 24 Mother's analysis of what is just and reasonable under the circumstances focuses upon ability to pay. Here, the trial court found that Mother had acted in an arbitrary and capricious manner and exacerbated the litigation. As noted by the Court in Thielenhaus v. Thielenhaus, that "[w]idespread courthouse folklore--that either the nonprevailing party in the case or the principal spousal provider is under a duty to pay counsel fees in matrimonial litigation--is not the law in Oklahoma. It is a hard-to-repress legal myth." (Emphasis in original). 1995 OK 5, ¶ 19, 890 P.2d 925, 934. Attorney fees must be granted only to litigants who qualify for the benefit through the process of a judicial balancing of the equities.

¶ 25 There is no abuse of discretion in requiring Mother to pay the attorney fees she actively participated in creating, just as there was no abuse in ordering Father to bear the cost of fees his actions caused to be incurred. The determination of whether and how to assess attorney fees in this kind of action is addressed to the sound discretion of the trial court. We will not modify its decision absent a showing of abuse of discretion, Wood v. Wood, 1990 OK CIV APP 49, 793 P.2d 1372, and that showing is not made in this record.

CONCLUSION

¶ 26 The trial court did not err in refusing to award attorney fees to Grandparents. Mother has not demonstrated any error of law in the visitation order or that the order should be disturbed because it was against the clear weight of the evidence or was an abuse of discretion. Moreover, the trial court's order requiring Mother to pay a portion of Father's attorney fees was not an abuse of discretion. The trial court's orders are affirmed. Father's request for appellate attorney fees is denied.

¶ 27 AFFIRMED

¶ 28 HANSEN, P.J., and JONES, C.J., concur.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

ERICA SICKING, Plaintiff,	)	FILED: March 3, 1998
vs.	)	Case No. FD-96-3624
JAMES D. SICKING, JR., Defendant.	)	

ORDER DETERMINING VISITATION AND CHILD SUPPORT

On the 26th day of January, 1998, this matter came on for decision before me, the undersigned Judge. A Decree of Divorce was previously entered herein on November 8, 1996 but reserved issues of paternity, custody, and support of the minor child of the marriage yet unborn. Visitation and support issues between the Plaintiff and Defendant, and visitation issues pertaining to Intervenors were tried to the Court on November 18, 1997; November 25, 1997; December 4, 1997; December 17, 1997; and January 7, 1998, the other issues having been previously resolved by agreement. Thereafter, the Court received certain post-trial recommendations and legal authority tom Plaintiff, Defendant and Intervenors.

The Court, having heard the oral testimony of a number of witnesses sworn and examined in open Court, having received into evidence certain exhibits, having fully reviewed the files and pleadings herein including the post-trial recommendations of all parties, finds as follows:

I.

1. This Court has jurisdiction over the parties hereto and the subject matter hereof. This Court has jurisdiction over the minor child, Catia Marie Dorwart, born February 19, 1997, pursuant to the Uniform Child Custody Jurisdiction Act.

2. The Court finds Plaintiff and Defendant were married on April 30, 1996, and separated on July 12, 1996.

3. Plaintiff and Defendant were divorced on November 8, 1996, and all issues regarding the minor child were reserved.

4. Catia Marie Dorwart, the minor child of the parties, was born on February 19, 1997.

5. Plaintiff did not advise Defendant of the birth of the child, and caused the hospital not to report the birth of the child in the newspaper listing all births in Tulsa hospitals.

6. Defendant was advised of the birth of the minor child on February 26, 1997, and commenced child support payments in March of 1997 without order of the Court.

7. Plaintiff voluntarily allowed Defendant fourteen visits with the minor child prior to trial. These visits were generally thirty minutes in length at the Plaintiff's home, and supervised by an employee in Plaintiff's household or Plaintiff.

8. Defendant was never allowed to feed the child or to hold the child after an incident where the child suffered a bumped head.

9. Defendant was never allowed to bring this parents, Intervenors James Sicking and Gloria Sicking, for any of the visits until a Court-ordered visitation December 23, 1997.

10. Plaintiff and Defendant are both law students; Plaintiff attends full-time; Defendant works full-time and attends night school.

11. Defendant in his answer admitted paternity, then later requested genetic testing, and then still later, on April 7, 1997, admitted paternity without genetic testing.

12. Dr. Leslie Barnes tested Plaintiff and Defendant, and found only slight elevations on any scale by either party.

13. A high level of conflict exists between the parties in this action.

14. According to the testimony of Dr. Barnes, Plaintiff does not support visitation between Defendant and the minor child.

15. Defendant has been advised to take a comprehensive series of parenting classes; however, Defendant has only taken three isolated parenting classes.

16. On September 17, 1997, Plaintiff stopped all visitation between Defendant and the minor child, and based on the testimony of Dr. Leslie Barnes, the three incidents which Plaintiff relied on to terminate this visitation were insufficient reason for such termination.

17. Plaintiff alleges that Defendant has a drinking problem, but this allegation was not supported by the evidence presented.

18. Dr. Jo Ellen Beard, a clinical psychologist with whom the Plaintiff met fourteen times (four times with the minor child), testified that the minor child's best interests are served by having a relationship with both parents.

II.

Based upon all the foregoing, and after review of the applicable Oklahoma law and cases cited by the parties, the Court finds that it is in the best interests of the minor child that Defendant be awarded visitation as follows:

1. One hour of visitation three times each week in Plaintiffs home until Defendant completes the parenting classes recommended by Dr. Jo Ellen Beard, that is, the course conducted by the Parent Child Center. The Court does not find supervision necessary but if Plaintiff desires that these visits be supervised that supervision may be done by someone other than Plaintiff: The time for the visits is to 'be arranged by counsel for the parties as Defendant has a schedule which includes full-time work, and law school in the evening hours.

2. After Defendant has completed the parenting classes, his visitation shall increase to six hours per week, to be exercised. either in three (3) two hour visitations or two (2) three hour visitations, at Plaintiffs elections. These visits may be in Defendant's home. The first three (3) .visits are to be supervised by Dr. Leslie Barnes and thereafter the visits will not be supervised.

3. The Court will make further orders concerning visitation on April 24, 1998, at 1:30 p.m. after a review of this matter.

III.

The Court finds this is a proper case for child support to be set pursuant to the Child Support Guidelines. The Court finds as follows:

1. Defendant's income is $32,000.00 per year which is $2,666.66 per month.

2. Plaintiff is capable of earning $24,000.00 per year, but is currently earning $500.00 per month in addition to room and board from her parents while she completes law school.

3. Defendant presently carries major medical insurance coverage on the minor child that costs $107.50 per month.

4. Plaintiff's income is set at minimum wage while Plaintiff is in law school, with Plaintiff to supply her gross monthly income to Defendant upon obtaining employment.

5. With the Defendant's income at $2,667.00 per month, the Plaintiff's income at $903.00, such makes. a combined monthly income for the parties of $3,570.00. Such makes the Defendant's proportionate share seventy-five percent, the Plaintiff's proportionate share twenty-five percent.

6. The base child support is $412.00, making Defendant's share $309.00. The monthly medical insurance premium carried by the Defendant is $107.50. Plaintiffs bare of that is $26.88, all of the foregoing makes a month child support payment due from Defendant to Plaintiff in the amount of $282.12.

7. Payment of child support is to commence February 1, 1998.

8. Plaintiff is granted an immediate income assignment.

9. There is presently no child care expense.

IV.

The Court finds that Plaintiff s hospital bill was in the amount of $3,800.00. After payment by the insurance provider, any sums remaining unpaid shall be paid at the rate of 75% by Defendant and 25% by Plaintiff:

V.

As to grandparental visitation, the Court finds as follows:

1. The Intervenors, paternal grandparents James D. Sicking and Gloria Sicking, were interviewed by Dr. Leslie Barnes.

2. . Dr. Barnes had no concerns regarding James D. Sicking.

3. The Intervenors have been married thirty-two years. James D. Sicking, is vice president of a local bank, and Gloria Sicking has been a stay-at-home mother.

4. Gloria Sicking has had extensive mental health treatment, has some short-term and long-term memory loss, and has taken prescription drugs for depression.

5. Gloria Sicking has some physical problems as a result of being hit by a car. as a child... These injuries do not keep Gloria Sicking from her normal activities.

6. Dr. Leslie Barnes testified that the Intervenors should have visitation with the minor child as soon as possible, despite her belief that the Plaintiff does not want the child to know the Defendant or the Intervenors.

Based on the foregoing and 10 O.S. Section 5; *In Re: Bomgardner,* 711 P.2d 92; *In the Matter of D: S. and N.S.,* 806 P.2d 1142; as well as other cases cited by the Plaintiff, Defendant, and Intervenors, the Court finds as follows:

1. 10 O.S. Section 5(a)(1) mandates that a Court shall afford each and every grandparent reasonable rights of visitation with an unmarried minor child if the Court finds such visitation to be in the best interests of the child.

2. 10 O.S. Section 5(b) lists the factors which the Court shall consider in determining the best interests of the minor child. Plaintiff mother has addressed each of these factors in

her post-trial brief, and the Court has considered all six factors and finds as follows:

A. That the Intervenors have shows a willingness to encourage a close relationship between the child and the parents.

B. That the Intervenors have no prior relationship with the minor child as the Plaintiff has not allowed contact between the minor child and the Intervenors.

C. That at eleven months old, the child is not of sufficient maturity to express a preference.

D. That the child is in excellent mental and physical health.

E. That Intervenor No. 1, James D. Sicking, is in excellent mental and physical health, and Intervenor No. 2, Gloria Sicking, has some physical problems and some mental problems. However, these problems are not so severe as to prohibit visitation, and the Court has addressed these problems in the visitation orders that follow.

F. That the Intervenors are people who will be an addition to Catia Marie's life.

Based on all the foregoing, the Court fords that the Intervenors shall have visitation with the minor child as follows:

1. Intervenors may visit the minor child with the Defendant once every two weeks.

2. This visitation may be with the Defendant at his visitation, or once every two weeks the Intervenors may exercise Defendant's visitation if he is unable to exercise said visitation.

3. Intervenor No. 2, Gloria Sicking, is to have visitation in the presence of the Defendant or Intervenor No. 1, James D. Sicking.

4. Intervenor No. 2, Gloria Sicking, is not to drive the minor child.

VI.

As to the child's surname: the Court finds as follows:

1. The child was christened Catia Marie Dorwart on June 7, 1997.

2. The custodial parent has testified that she intends to continue to use her maiden name.

3. The Plaintiff and the minor child currently reside in the maternal grandparents (Dorwart) household.

4. The Court finds no good reason to prefer the natural father's name over the natural mother's name.

Based on the foregoing, and after considering all the cases cited by Plaintiff, the Court finds that the minor child's name shall remain Catia Marie Dorwart.

IT IS SO ORDERED.

CLANCY SMITH

JUDGE OF THE DISTRICT COURT

3-3-98

APPROVED AS TO FORM ONLY:

/s/

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APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, February 16, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDER OF THE COURT:

91,490 Erica Sicking v. James D. Sicking, Jr, v. James D. Sicking and Gloria J. Sicking.
Petition for certiorari is denied.
CONCUR: Summers, CA, Hargrave, V.C.J., Lavender, Opala, Winchester, JJ.

Kauger, J., with whom Hodges, Watt and Boudreau, JJ., joins, dissents by separate writing.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ERICA SICKING,	)	
	)	
Plaintiff/Appellee/Counter-Appellant,	)	
	)	
v.	)	
	)	
JAMES D. SICKING, JR.,	)	
	)	
Defendant/Appellee/Counter-Appellee,	)	No. 91,490
	)	
v.	)	
	)	
JAMES D. SICKING and GLORIA J. SICKING	)	
	)	
Intervenors/Appellants/Counter-Appellees.	)	

¶1 KAUGER, J., with whom Watt, J. and Boudreau, J. join, dissenting:

¶2 The cause squarely presents the issue of the constitutionality of visitation rights granted to grandparents under 10 O.S. Supp. 1997 §5. Rather than refusing to review the issue, I would grant certiorari and await the opinion of the United States Supreme Court in Troxel v. Granville, 969 P.2d 21 (Wash. 1998), *cert. granted*, ___ U.S. ___, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999), scheduled for oral argument on January 12, 2000.

APPENDIX D

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS

DIVISION I
October 14, 1999

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

91,490 - Erica Sicking, Plaintiff/Appellee/Counter-Appellant, v. James D. Sicking, Jr., Defendant/Appellee/Counter-Appellee, and James D. Sicking and Gloria J. Sicking, Intervenors/Appellants/Counter-Appellees.

The Petition for Rehearing filed by Appellee/Counter-Appellant is **DENIED**.

OPPOSITION

BRIEF

(2)

No. 00-103

JUN 15 2000

CLERK

In The

Supreme Court of the United States

ERICA DORWART,

Petitioner,

v.

JAMES D. SICKING and GLORIA J. SICKING,

Respondents.

On Petition For A Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant review, vacate the judgment below, and remand the case to the Oklahoma Court of Civil Appeals for reconsideration, in light of this Court's decision in *Troxel v. Granville*, 120 S. Ct. 2054 (2000), of the question whether the Oklahoma grandparents' visitation statute, 10 Okla. Stat. § 5, either on its face or as applied in this case to grant paternal grandparents visitation rights over petitioner's objection deprives petitioner of her right under the Due Process Clause of the Fourteenth Amendment to direct and control the upbringing of her daughter.

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REFERENCE TO OPINIONS RENDERED BY THE COURTS BELOW

The opinion of the Oklahoma Court of Civil Appeals is reported at 996 P.2d 471, and is reprinted at pages 1a through 13a of Petitioner's Appendix ("Pet. App."). The judgments and findings of the District Court (Pet. App. 14a through 25a) have not been reported.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this matter are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

For the most part, Petitioner's Statement of the Case adequately sets forth the proceedings at trial. One statement made by Petitioner is incorrect. Petitioner states that James D. Sicking, Jr. ("Father") "disclaimed any interest in the dispute" between Petitioner and Respondents James D. Sicking and Gloria J. Sicking ("Grandparents") concerning grandparental visitation. (Petition, p. 4). While Father did not file a pleading or brief supporting grandparental visitation, the fact is that Father

supported and approved of the court-ordered grandparental visitation, and the opinion of the Oklahoma Court of Civil Appeals so states. (See Pet. App. 5a).

Petitioner neglects to set forth the important fact that Father testified in favor of the grandparental visitation. For example, he testified that he had made repeated unsuccessful attempts to persuade Petitioner to give permission to allow Grandparents to visit the child. He also testified that Grandparents provided care for his cousins and that they never had difficulty in doing so.

In addition, Petitioner contends that Father and Grandparents were estranged at the time of the marriage of Father and Petitioner. While Petitioner presents this as a purportedly undisputed fact, in reality there was a dispute concerning this purported "estrangement", and neither the Trial Court nor the Oklahoma Court of Civil Appeals made a finding concerning this question.

Additionally, Petitioner argues in the Statement of the Case that because the Oklahoma Court of Civil Appeals stated, " . . . custody and visitation are matters of equity, and they are left to the sound discretion of the trial court", this means that the court "refused to accord any deference to petitioner's wishes regarding grandparent's visitation." (Petition, at 6). This argument begs the question as to whether Petitioner was entitled to such deference in the factual context presented here. In addition, Petitioner in any event was provided "deference" because of Oklahoma's statutory provisions as discussed further at pages 8-11 below.

REASONS FOR DENYING REVIEW

I. *Troxel v. Granville*, 120 S. Ct. 2054 (2000), Provides No Support For Petitioner's Position.

In arguing that a writ of certiorari should be granted, Petitioner relies solely on *Troxel v. Granville*, 120 S. Ct. 2054 (2000). Petitioner's reliance on *Troxel* is misplaced. Petitioner fails to address the major differences between this case and *Troxel*. *Troxel* does not deal with the factual situation presented in the case at bar. Indeed, *dictum* in *Troxel* supports Respondents' position concerning grandparental visitation. Petitioner asks this Court to vacate the judgment of the Oklahoma Court of Civil Appeals and to remand for consideration in the light of *Troxel*, but that would be an exercise in futility. *Troxel* does not speak to the facts in this case and, as explained below at pages 9-10, supports affirmance of the decision of the Oklahoma Court of Civil Appeals.

A. This Case Is Fundamentally Different From *Troxel* Because Here One Of The Parents Supported And Approved Of The Court-Ordered Visitation, Both Natural Parents Are Alive, And This Case Involves Visitation Rights Sought After Divorce, Not Death.

In *Troxel*, there was only one living parent of the child. In the instant case, both parents are alive. Because *Troxel* involved only one living parent, it is not difficult to understand why this Court concluded that the trial court in the State of Washington should have given special weight to that sole parent's view as to whether grandparental visitation should occur.

A situation in which there is only one living parent who opposes grandparental visitation is, for all practical purposes, equivalent to a situation in which both parents are living and are still an intact nuclear family and both oppose grandparental visitation. This situation of an intact nuclear family opposing visitation is addressed in *In re Herbst*, 971 P.2d 395 (Okla. 1998), relied upon by Petitioner in the courts below. The Oklahoma Court of Civil Appeals correctly noted the significant difference between the objections of both parents in an *intact* nuclear family and the case at bar, which involves the objection of only one divorced parent.

Significantly, the Father in the case not only did not object to Grandparents' visitation – he supported it. Among other things, he testified that the Grandparents provided care for his cousins and that they never had difficulty in doing so. The Father also testified that he had made repeated unsuccessful attempts to obtain permission from Petitioner for the Grandparents to visit the child.

The Father's support of visitation by Grandparents belies Petitioner's suggestion that Father was somehow "neutral" on the visitation issue. Petitioner asserts in her Petition that "[Father] disclaimed any interest in the dispute between Petitioner and the [Grandparents] over the [Grandparents'] visitation rights." Petitioner apparently focuses on the fact that Father did state at trial that "I shouldn't be their [Grandparents'] ticket in [to visitation rights]; they should have their own ticket."

Apparently this statement by Father was made because, at the time of the hearing, Father wanted

Grandparents to have visitation time of their own – not as part of his time. In reality, the trial court's ultimate award merely did apportion part of Father's visitation time to Grandparents, as requested by the Grandparents, allowing Grandparents either to visit with Father or during Father's allotted visitation times when Father was unable to visit. Father did not object to this order by the trial court and did not appeal from it. In any event, this isolated statement by Father does not indicate "neutrality" concerning visitation by Grandparents. As noted above, Father's testimony at the hearing supported Grandparents' right to visitation. Most importantly, the Oklahoma Court of Civil Appeals concluded that Father "supported" and "approved" of the court-ordered grandparental visitation.

Petitioner may base her "disclaimer" statement on a purported appellate pleading in which Father stated that he "disclaimed any interest" in the grandparental visitation dispute between Petitioner and Grandparents. Although Petitioner made this "disclaimer" argument below, she did not support it with any reference to the appellate record. Grandparents have been unable to locate any pleading in which Father makes such a statement. In any event, if such a "disclaimer" by Father does exist in the appellate record, such "disclaimer" is irrelevant. Since only Grandparents could have legal rights to grandparental visitation, it makes sense that Father would disclaim, on appeal, any interest in the grandparental visitation dispute. The fact that he did not have any legal interest to protect, however, does not detract from his support for and approval of grandparental visitation.

Petitioner's contention as to Father's "neutrality" is contradicted by the Oklahoma Court of Civil Appeals. That Court framed the constitutional issue presented by Petitioner as follows:

> The narrow issue presented here is whether [10 O.S. Supp. 1996] § 5 is unconstitutionally applied when the parents of a non-custodial parent involved in a divorce case are given "independent" rights to visit with their grandchild, *with the support and the approval of the non-custodial parent*, during the time which would otherwise be used by the non-custodial parent for visitation with the child and the non-custodial parent is unable to exercise that visitation [footnote omitted]. [Pet. App. 5a] [Emphasis Added.]

In the quoted language, the Oklahoma Court of Civil Appeals finds and concludes that Father supported and approved grandparental visitation. Petitioner's attempt to evade this fact should be rejected. This Court does not seek to "correct" factual conclusions adopted by lower courts except under egregious circumstances. "A court of law, such as this Court is . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996).

On appeal, Petitioner has simply ignored the existence of Father and taken the position that she has the right to unilaterally veto court-ordered visitation by the Grandparents. For example, she complains that the Oklahoma statute does not "include the *parent's* own views as among the factors the court must be [sic] consider, much

less give special weight." Petition, p. 11, at n. 4 [emphasis supplied]. It is noteworthy that Petitioner uses the singular *parent* rather than *parents* – apparently because she is unwilling to acknowledge that Father's view should be considered, or given "special weight".

It is one thing to talk of "special weight" when, as in *Troxel*, there is only one surviving parent. But what of a case like this one in which both parents are still living and are divorced? In such a case is the view of both parents to be given "special weight"? If so, what if one parent objects to visitation and the other supports it? Surely the trial court in that situation must perform its function as "tie-breaker" and therefore not give "special weight" to the views of either parent. There is a significant difference between a situation in which a court substitutes its own judgment for that of the sole parent, as in *Troxel*, and a situation in which a court must perform its traditional function of making a decision when the parents have differing views concerning grandparental visitation.

Petitioner attaches great significance to *Troxel's* reference to the "custodial parent" and argues that the views of the custodial parent should be given "special weight." However, in *Troxel*, the "custodial" parent was the only parent. Grandparents submit that *Troxel* cannot be read to confer special rights relating to grandparental visitation to the custodial parent and not to the non-custodial parent. If only the custodial parent's views are given "special weight", what happens when there is a change of custody? Once again, these issues are not confronted in *Troxel*, and the *Troxel* opinion provides no guidance.

Change of custody is a real and substantial issue in this case. On June 5, 2000, after the Oklahoma Court of Civil Appeals rendered its opinion, the trial court granted temporary custody to Father. The trial court's order is currently in effect. A copy of the order is attached as Respondents' Appendix (See Res. App. 1a and 4a). Grandparents submit that the change of custody order makes this case moot. At a minimum, the change of custody order casts an ironic shadow on Petitioner's claim that only the views of the custodial parent deserve "special weight." Petitioner's view would create a potential visitation "ping-pong" match between the initial custodial parent and her successor regarding grandparental visitation. Under Petitioner's view, the trial court would be required to give "special weight" to the preference of the parent who happened to have custody at that point in time.

B. The Oklahoma Statutes At Issue Here, On Their Face And As Interpreted By Oklahoma Courts, Differ Fundamentally From The Washington Statute Considered By The Court In *Troxel*.

There are other important differences between this case and *Troxel*. The plurality opinion in *Troxel* characterizes the Washington statute as "breathtakingly broad". That statute allowed anyone to petition for visitation rights at any time, and Washington law did not provide any standards for what would be in the best interests of the child.

In the case at bar, the Oklahoma statute is much more narrowly drawn. The Oklahoma statute provides only for

grandparental visitation – not visitation by other parties. Although the Oklahoma statute does not on its face limit the time or situations in which visitation can be sought, the Oklahoma Supreme Court has narrowed the statute to situations in which divorce occurs or death has affected the family. *In re Herbst*, 971 P.2d at 399. (This Oklahoma judicial gloss on the grandparental visitation statute makes it very similar to the New Hampshire statute mentioned by Justice Kennedy in his dissenting opinion in *Troxel*. 120 S. Ct. at 2078.)

The Oklahoma statute also provides specific standards for a trial court to consider in determining whether grandparental visitation would be in the child's best interest. These standards are set forth on pages 2 and 3 of the Petition. *Troxel* strongly implies (although admittedly does not decide) that the Oklahoma grandparental visitation statute is valid. The plurality opinion states:

> . . . We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' Post, at 9 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. [FN] See, *e.g., Fairbanks v. McCarter*, 330 Md. 39, 49-50, 622 A.2d 121, 126-127 (1993) *(interpreting best-interest standard in grandparent visitation statute normally to require court's*

> *consideration of certain factors); Williams v. Williams*, 256 Va. 19, 501 S.E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation) [Emphasis added]. 516 U.S. at 2064.

The Oklahoma legislature, like the court in *Fairbanks v. McCarter*, 622 A.2d 121, 126-127 (Md. 1993), has set forth factors for the trial court to consider in determining whether the visitation is in the best interest of the child. As a consequence, the Oklahoma statute is valid. Indeed, the Oklahoma Legislature has listed factors similar to those listed by the *Fairbanks* court.

Petitioner acknowledges that the Oklahoma statute sets forth standards but claims that they are not sufficient, because they do not include the "parent's" own views as to visitation. Petitioner ignores the fact that here the parents have differing views. Is only one of their "views" to be given "special weight"?

Petitioner's "special weight" argument is also totally without merit in the context of Oklahoma's statutes. The statutory language clearly provides that the grandparents seeking visitation rights can only be awarded those rights if they show such visitation would be in the best interests of the child. Indeed, grandparents must satisfy the court that the standards in the statute (and other appropriate factors) indicate that visitation would be in the child's best interest. Since the grandparents have this burden under the Oklahoma statute, it is obvious that the position of an objecting parent is automatically given "special weight". Although Petitioner claimed in the Oklahoma appellate courts that the trial court erroneously applied a

presumption that grandparental visitation should be allowed, that contention was rejected by the Oklahoma courts and is not mentioned in her Petition.

The existence of statutory standards avoids the problem in *Troxel*. In the standardless "best interest of the child" statutory scheme in *Troxel*, the trial court was invited, and indeed, required, to substitute its own arbitrary opinion for that of the parent. That risk of arbitrary and standardless action does not exist in Oklahoma where the trial court was provided with specific standards that it was required to consider before making a decision concerning visitation. The trial court made express findings concerning those standards, as reflected in its Order (Pet. App. 20a).

C. This Case Differs Fundamentally From *Troxel* Because Of The Limited Nature Of The Visitation Rights Granted To Grandparents.

Another important distinction between *Troxel* and the case at bar involves the nature of the "independent" visitation rights granted to the Grandparents. Under the visitation order challenged here, Grandparents were granted very limited rights. They were permitted to visit once every two weeks after a period of one year. This visitation was to be jointly with Father, or, if the Father was unable to visit, Grandparents could visit with the child in lieu of the Father.

The situation here is therefore quite different from *Troxel*. The trial court's order did not require Petitioner to give up any of her time with the child. Significantly, Grandparents did not even request that Petitioner give up

any of her time with the child. The record below contains ample evidence of Grandparents' concern that the parents' time with the child not be adversely affected by grandparental visitation. The Grandparents were only given an award carved out of the Father's time with the child. (See, Pet. App. 20a-21a.)

D. Issuance Of A "GVR" Order Would Be Totally Inappropriate Because *Troxel* Provides No Clear Guidance Concerning The Issues In This Case.

Petitioner, relying on *Lawrence v. Chater*, 516 U.S. 163 (1996), seeks a writ of certiorari granting review of the decision of the Oklahoma Court of Civil Appeals, vacating that decision and remanding for reconsideration in light of *Troxel*. *Lawrence*, while approving use of such a "GVR" order in certain instances, certainly provides no support for Petitioner here.

The *Lawrence* court stated: "On the one hand, all [of the Justices of this Court] are agreed that a wide range of intervening developments, including confessions of error, may justify a GVR order. On the other hand, *all are agreed that our GVR power should be exercised sparingly*." 516 U.S. at 173. [Emphasis added.] The issuance of a GVR order in *Lawrence* was hardly surprising. *Lawrence* was a case arising under the Social Security Act. The GVR was issued to allow the lower court to have a chance to consider, for the first time, a new interpretation of the Social Security Act that had been adopted by the Social Security Administration. In *Lawrence* the government admitted that the Social Security Administration had "re-examined" the role of

state paternity and intestacy laws. Thus, while the government did not confess error as such, it did acknowledge that a change in the agency's interpretation favorable to the petitioner had taken place.

Lawrence articulated the reason for the granting of a GVR order as follows:

> Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. 516 U.S. at 167.

While this Court's opinion in *Troxel* was certainly an "intervening development", it does not in any way "reveal a reasonable probability" that the Oklahoma Court of Civil Appeals' decision rests upon a premise that it would now reject. As noted above, *Troxel* does not address the issue raised in the case at bar and provides no indication to the Oklahoma Court of Civil Appeals that the law relevant to its opinion has changed in any way. An intervening opinion of this Court that does not address the issue considered by the lower court does not create the unusual situation justifying the exercise of the GVR power.

It simply makes no sense for a custodial parent to argue that her opposition to grandparental visitation deserves greater deference than a noncustodial parent's contrary view. According to Oklahoma's highest court, courts must intervene to consider grandparental visitation issues when parents divorce. *In re Herbst*, 971 P.2d at

399. The "deference" which this Court concluded should be extended to the sole surviving parent in *Troxel* simply makes no sense when both parents have differing views as to whether grandparental visitation is appropriate. Certiorari should not be granted.

If, however, this Court should decide to grant certiorari, it should then decide the issues in this case and issue an opinion. Issuing a GVR order would provide no guidance to courts applying the Oklahoma statute because *Troxel* does not discuss or examine the issue presented here.

II. This Dispute Is Moot.

Petitioner's argument arises from her status as custodial parent. The trial court has recently awarded temporary custody to Father. See Res. App. 4a.

Because Petitioner is no longer the custodial parent, her pleas and arguments that her views on grandparental visitation are entitled to special deference are now moot. Mootness is "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), *quoting* Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Erie v. Pap's A.M.*, 529 U.S. ___, 120 S. Ct. 1382 (2000) (at page 6), *quoting City of Los Angeles v. Davis*, 440 U.S. 625,

631 (1979). This Court does not review disputes that are moot. "The case or controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As a consequence, certiorari should be denied.

For all of the above reasons, the petition should be denied.

Respectfully submitted,

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August 15, 2000

IN THE DISTRICT COURT WITHIN AND FOR TULSA *COUNTY*
STATE OF OKLAHOMA

ERICA SICKING, PLAINTIFF, v. JAMES D. SICKING, JR., DEFENDANT	CASE NO. FD-96-3624 JUDGE TERRY H. BITTING

INTERIM TEMPORARY CUSTODY ORDER
AND
ORDER CONSOLIDATING EMERGENCY HEARING WITH DEFENDANT'S MOTION TO MODIFY
AND
ORDER DENYING STAY

(Filed Jun. 5, 2000)

NOW on this 23 day of May 2000 this matter comes on before me, the undersigned judge of the district court. upon Defendant's Emergency Application for Temporary Custody filed April 26, 2000. Due to scheduling conflicts among the attorneys and the court, this matter was partially heard on the following dates: May 5, 2000 and May 23, 2000.

1. On April 26, 2000, the Court appointed Jerry L. Perigo as *Guardian Ad Litem* for the minor child, Catia Marie Dorwart, *sua sponte*. Mr. Perigo served in the same capacity during Plaintiff's Application for

Emergency Order Modifying Decision Regarding Overnight Visitation.[1]

2. Testimony began on May 5, 2000 from which it became evident that visitations scheduled for Catia and her father were not taking place as scheduled, a situation that has continued, off and on, since Judge Messler's Order rendered in December 1999.

3. Testimony of Plaintiff established that from December 25 through February 18, 13 visitations did not occur between the child and her father (Defendant). These visitations included Christmas, the child's birthday and Easter, all of which by court order, should have been Defendant's scheduled visitation.

4. From February 22nd through April 18th, while Plaintiff's Emergency motion continued to be heard, at least five (5) visits, scheduled by court order, did not occur.

5. Following the conclusion of the April 19th hearing, visitation with the defendant and Catia was to occur during the evening hours. Defendant attempted to exercise his visitation with Catia, and the events that took place at the Dorwart household[2] escalated. Defendant suggested a walk to help calm the child who was crying when he arrived, mother and child skipped ahead of

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[1] Hearings on Plaintiff's Application began February 22nd and concluded April 19th, 2000.

[2] Catia and her mother live on the same premises with the maternal grandmother and grandfather.

father and a visitation monitor[3], mother raised her voice and accused father of perjury or lying *in front of the child*, Mother yelled at the visitation monitor. Maternal grandparents came out of the house and accosted the father and visitation monitor, and culminated with the maternal grandfather grabbing the visitation monitor's arm in a rage while yelling at the visitation monitor and father. The child, however, was not present for the altercation with the grandparents (at least part of the time).

6. The events related by both Plaintiff and the partial testimony of one witness, [regarding the 19th of April] resulted in this Court changing the method by which visitation should begin and end and changed the place of exchange to the offices of Mr. Perigo. The Order entered by the court followed an informal discussion with counsel for the parties and Mr. Perigo prior to testimony being heard. Specific instruction was given to attorneys for the parties and Mr. Perigo which specified, *inter alia*, that the parent's of the child were the persons who could carry out the exchange, and under conditions that allowed for no physical contact between them.

7. This Court requested that Mr. Perigo submit a report regarding the visitation exchanges prior to the hearing scheduled for May 22, which he did the following

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[3] Michele Courchesne was the visitation monitor selected by father, and had either accompanied him or observed his interaction with Catia on several prior occasions.

date, May 18, 2000. Both Plaintiff and Defendant shall be entitled to refute any or all of the report submitted by the *guardian ad litem*.

8. In addition, this court has read and understands the decision rendered by the Court of Civil Appeals, 2000 OK CIV APP 32. Of particular importance is the reference by the appellate court to the trial court's note of "the level of acrimony in this case from, [Mother] to [Father] is unprecedented for a marriage that only lasted two months."[4] Sadly for Catia, Mother's hostility toward father is acute, and not dissipating with time.

9. Regardless of Mother's protestations to the contrary, she does not encourage Catia to visit with her father, in fact, it is apparent that she is the cause of the child's upset on many, if not most, occasions. Whether she realizes it or not, she has embarked on a pattern of behaviors that leaves no doubt about her desire not to foster a relationship between Catia and her father. Mother chooses instead to deny, negatively prepare, and obstruct visitation, in addition to verbally abusing those who attempt to assist Catia and her father in seeing one another.

10. Pursuant to 43 O.S. § 112(D)(1) and (2) the Court must enter an Interim Order for Temporary Custody of Catia Marie Dorwart,

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[4] See ¶ 22.

placing Catia with the Defendant until further Order of this court.

11. Plaintiff's Motion to Consolidate is hereby granted. Mr. Perigo is hereby appointed to continue as *Guardian ad litem* for Catia through the conclusion of all proceedings or until further order of this court.

12. The parties are hereby ordered to submit Child Support Computations pursuant to the Oklahoma Child Support Guidelines within 10 days of this Order.

13. The Plaintiff shall be entitled to visitation with Catia every other Wednesday evening from 6:00 p.m. until 8:00 p.m., exchanges to continue to take place at the offices of Mr. Perigo, and are to be carried out by Ms. Dorwatt and Mr. Sicking, *only*, according to Mr. Perigo's direction. In addition, Plaintiff shall be entitled to alternating weekends and holidays in accordance with the most recent Order establishing visitation.

14. Mr. Perigo shall submit monthly reports, by the 25th of each month (beginning with June), regarding visitation exchanges, and if it becomes apparent that the behaviors of the Plaintiff continue to interfere with Catia's enjoyment of *both* of her parents, appropriate adjustments will take place swiftly.

15. This court is mindful of Defendant's pending Motion to Modify custody, and the parties desire to resolve these matters. This court will appoint an evaluator for purposes of determining what is in the beat

interests of this child, and Orders all parties to cooperate, The cost of the evaluation shall be shared according to the parties respective percentage of their combined incomes according to the Oklahoma Child Support Guidelines. Psychological evaluation shall be ordered for both Plaintiff and Defendant at minimum.

16. Plaintiff's request for stay of this Order to seek extraordinary relief before the Oklahoma Supreme Court is denied. The Order is based on this Court's belief that this Order is in Catia's best interest, it would not further her best interests for the Order to be stayed.

17. The original Decree entered in this case by Judge Clancy Smith regarding visitation of the paternal grandparents and the child shall remain until further Order of the court. The maternal grandparents shall be entitled to share with Plaintiff any time they wish to spend with Catia.

18. Catia's personal effects and clothing shall be exchanged at the conclusion of Memorial Day visitation, transfer of the child shall continue at the offices of Mr. Perigo on Friday at 6:00 p.m. and Monday at 6:00 p.m.

19. Mr. Sicking shall provide telephone numbers for the day care center, the name of a teacher at the licensed facility where Catia will be.

20. Plaintiff's and Defendant's pending contempt citations, Defendant's Motion to Assess Attorney Fees, the GAL request for

fees will be addressed on June 15, 2000 at 10:30 a.m.

21. The contempt citations are not consolidated at this point in time because of the Plaintiff's request for a jury trial which would not be able to be scheduled until September.

IT IS SO ORDERED.

Dated this 3 day of June, 2000.

/s/ Terry H. Bitting
Terry H. Bitting,
Judge of the District Court

CERTIFICATE OF SERVICE

I, the undersigned, Deputy Clerk of the District Court, do hereby certify that on the _____ day of _____, 2000, a true and correct copy of the foregoing Order was

_____ transmitted by facsimile;

_____ transmitted by facsimile and also mailed by regular mail;

_____ mailed by regular mail with postage fully prepaid thereon;

_____ mailed by Certified Mail, Receipt No. _____, with postage fully prepaid thereon;

_____ hand delivered;

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SALLY HOWE-SMITH, Court Clerk,

By /s/ K. D. Mausten
Deputy Court Clerk

(SEAL)

FILED
SEP 15 2000
OFFICE OF THE CLERK

(3)

No. 00-103

IN THE

Supreme Court of the United States

ERICA DORWART,
Petitioner,

v.

JAMES D. SICKING AND GLORIA J. SICKING,
Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

REPLY BRIEF FOR THE PETITIONER

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IN THE

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On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

REPLY BRIEF FOR THE PETITIONER

The petition explains why this Court should grant certiorari, vacate the judgment below, and remand the case to the Oklahoma Civil Court of Appeals ("GVR") to allow that court to reconsider the constitutionality of its application of Oklahoma's grandparent visitation statute in this case in light of this Court's intervening decision in *Troxel v. Granville*, 120 S. Ct. 2054 (2000). The basic facts of this case establish that (i) the custodial parent (petitioner Dorwart) objected to the requested grandparent visitation; (ii) the Oklahoma trial and appellate courts accorded her position no special deference, in contravention of *Troxel*; and (iii) the Oklahoma courts applied the "best interests of the child" standard specifically found wanting in *Troxel*.

In their brief in opposition ("Opp."), respondents – who are grandparents of petitioner's child – make two principal arguments. First, respondents assert that certain factual distinctions between this case and *Troxel* suggest that the decision in *Troxel* has no bearing on this case. *See* Opp. at 3-14. Second, respondents contend that this case has become moot. *See* Opp. at 14-15. Neither of those arguments has merit, and neither calls into question the propriety of a GVR in these circumstances.

1. The facts of this case mirror *Troxel* in all relevant aspects.

a. The presence of the father in this case, *see* Opp. 3-8, does not distinguish the circumstances from *Troxel* in any material respect.[1] None of the opinions in *Troxel* suggested that the absence of another parent was in any way pertinent to the decision. The opinions instead focused on the rights of the custodial parent. Here, however, the Oklahoma courts gave no deference to the wishes of the custodial parent because they did not recognize that she had any constitutional right to have her opinion accorded special weight.

b. The fact that the Oklahoma statute might be said to channel the trial court's discretion in certain respects, *see* Opp. 8-11, is likewise immaterial. The critical infirmity of the Washington statute at issue in *Troxel*, as was noted in virtually all of this Court's opinions in that case, was its failure to accord the parent's wishes any special weight. The Oklahoma statute at issue here, and its application in this case, share that

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[1] Indeed, the father disclaimed any support for respondents' position. *See* R. 251, p.142; Answer Brief filed March 15, 1999, at 5, 6. In contending otherwise, respondents rely on factual dictum from the Oklahoma appellate court, *see* Opp. at 6, which is expressly contradicted by the record. In Oklahoma, as in most other jurisdictions, dictum is not binding. *See American Trailers, Inc. v. Walker*, 526 P.2d 1150, 1154 (Okla. 1974); *McKee v. Neilson*, 444 P.2d 194, 198 (Okla. 1968).

very same infirmity.[2]

c. Finally, the ostensibly limited nature of the award of grandparent visitation rights in this case, *see* Opp. 11-12, does not materially distinguish the circumstances from *Troxel*. Regardless of the precise contours of any eventual award of visitation, *Troxel* requires that in determining whether (and to what extent) grandparents should be afforded visitation rights, the parents' views must be given special weight. That was not done here.

2. The case is not moot. Respondents have the "heavy burden" of establishing mootness, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), a burden they have failed to carry. First, the *temporary* change of custody order focused on by respondents is – as its description reveals – only temporary.[3] Second, that temporary order specifically turned on the Oklahoma court's perception that petitioner had not satisfactorily complied with that court's visitation order, the very order being challenged in this case. *See* Opp. at 1a-7a. Thus, a vacateur of the visitation order would have profound effects on the pending custody issue.[4] Third, the temporary

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[2] The narrowing of the Oklahoma statute to encompass only situations involving death or divorce, *see* Opp. at 9, is inapposite. *Troxel* involved circumstances that would have been covered by the judicially-narrowed Oklahoma statute – the death of a parent.

[3] In Oklahoma, only final judgments and orders (either affirmed on appeal or for which no appeal is taken) are entitled to preclusive effect. *See Panama Processors, S.A. v. Cities Service Co.*, 796 P.2d 276, 283 (Okla. 1990); *State v. Kerr McGee Corp.*, 516 P.2d 813, 819 (Okla. 1973). As respondents note, custody has not been resolved in this case. *See* Opp. at 8. Trial on the issue of permanent custody has been continued until October 10, 2000. Prior to the continuance, the court-appointed custody evaluator testified that awarding permanent sole custody to the father would cause irreparable harm to the child.

[4] In many instances, the Court has rejected a claim of mootness by observing the collateral effects its decision might have. *See, e.g., Reno v. Bossier Parish School Board*, __ U.S. __, 120 S. Ct. 866, 870 (2000) (issue

order was entered on June 5, 2000, and so was issued without benefit of this Court's decision in *Troxel*, which was announced that same day. Finally, any effect that the temporary order might have upon this case can (and should) be addressed by the Oklahoma courts following a GVR.

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of 1992 plan not mooted by passage of time as the 1992 plan will have at least one collateral effect, serving as the baseline against which the next voting plan will be evaluated); *United States v. R.L.C.*, 503 U.S. 291, 296 (1992) (government's challenge to reduction of detention imposed on juvenile not mooted as result of service of reduced term; juvenile had not completed original term and possibility existed that remainder of it could be imposed); *Norman v. Cook County Officers Electoral Board*, 502 U.S. 279, 287 (1992) (challenge to constitutionality of statute setting forth number of signatures was not moot, even though election had been held and stay order had permitted candidate to run; candidates had run and some had met test for future ballot inclusion if they had properly been on the ballot); *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990) (respondent's flight did not moot case, for resolution by the Court of the issue determines the course of proceedings if and when he is rearrested); *Evitts v. Lucey*, 469 U.S. 387, 391 n. 4 (1985) (restoration of civil rights did not moot case, as former prisoner still subject to some collateral consequences, including use of conviction for impeachment in future proceedings and use as an enhancer should he be tried later on any other felony charges).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant certiorari, vacate the judgment of the Oklahoma Court of Civil Appeals, and remand the case for further consideration in light of this Court's decision in *Troxel*.[5]

Respectfully submitted,

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[5] We do not object to respondents' suggestion that rather than issue a GVR, this Court should grant certiorari and resolve this case on the merits. *See* Opp. at 14.